

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LANOEL BRAZIL,

Plaintiff and Appellant,

v.

SARA LEE CORPORATION,

Defendant and Respondent.

D045925

(Super. Ct. No. GIC817460)

APPEAL from a judgment of the Superior Court of San Diego County, Linda B. Quinn, Judge. Reversed.

In this case the plaintiff alleges that defendant violated California's Unfair Competition Law (the UCL) (Bus. & Prof. Code, § 17200 et seq.) by selling toilet bowl cleaners which damage plumbing. She alleges the defendant's conduct was in breach of express warranties provided to the public. Because it found that plaintiff's claims were preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (tit. 7,

U.S.C. § 36 et seq.), the trial court sustained the defendant's demurrer without leave to amend. As we explain, the trial court erred.

FIFRA provides a uniform federal scheme for the labeling of insecticides, herbicides and fungicides and preempts state laws which impose greater or conflicting labeling requirements on manufacturers. Following entry of the trial court's judgment, the United States Supreme Court filed its opinion in *Bates v. Dow Agrosciences LLC* (2005) __ U.S. __ [125 S.Ct. 1788, 1794] (*Bates*). In *Bates* the court significantly limited the preemptive impact of FIFRA. In particular it held that while, as a practical matter, a successful state breach of warranty claim might cause a manufacturer to alter a federally approved label, such a result did not bring the warranty claim within the scope of FIFRA. In light of *Bates*, plaintiff's warranty claim was not preempted by FIFRA.

Given the trial court's error, in other circumstances we would simply reverse and remand. However, the plaintiff here conceded she had never purchased the defendant's toilet bowl cleaners and instead alleged she was acting as a representative plaintiff on behalf the general public. On November 2, 2004, voters approved Proposition 64 and it became effective the following day. Under Proposition 64, representative claims, such as those alleged by plaintiff, are no longer cognizable under the UCL. Significantly, because Proposition 64 limited a statutory right, its limitation applies to all cases pending at the time it became effective. Because, in light of *Bates*, it appears plaintiff's claims may have merit, we remand so that the trial court may determine whether plaintiff should be permitted to substitute a plaintiff who meets the standing requirements imposed by Proposition 64.

SUMMARY

By way of her third amended complaint, plaintiff LaNoel Brazil alleged that defendant Sara Lee Corporation (Sara Lee) expressly warranted that its Ty-D-Bol automatic toilet cleaners do not harm plumbing. Brazil further alleged that in fact the toilet cleaners do harm plumbing components. Brazil also alleged Sara Lee failed to properly test its products before marketing them and that it continued to market them even after it discovered that they harm plumbing components. Finally, Brazil alleged that in marketing products which damage plumbing and breach its express warranties, Sara Lee violated the UCL.

As we indicated at the outset, Sara Lee demurred to the complaint on the grounds that it was preempted by FIFRA. At the time Sara Lee filed its demurrer, the controlling authority on the issue was *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 335-337 (*Etcheverry*). In *Etcheverry*, our Supreme Court held that state common law claims which are based on defects in a product's label, even if couched in terms of a breach of warranty theory, are preempted by FIFRA. (*Id.* at p. 335.) Quoting a series of federal appeals court opinions, our court stated: "If plaintiffs could recover large damage awards because [an] herbicide was improperly labeled under state law, the undeniable practical effect would be that state law *requires* additional labeling standards not mandated by FIFRA.' [Citation.]

" '[D]amages actions, just like regulatory mandates, cause companies to modify their economic decisions. It would be silly to pretend that federal lawmakers, seeking to occupy a whole field of regulation, wouldn't also be concerned about the distorting

effects of tort actions.' [Citation.]" (*Etcheverry*, *supra*, 22 Cal.4th at p. 327.) In interpreting Brazil's third amended complaint, the trial court found that it was premised on defects in federally approved labels and was therefore preempted by FIFRA. Accordingly, the trial court sustained Sara Lee's demurrer without leave to amend and entered judgment in its favor. Brazil filed a timely notice of appeal.

DISCUSSION

I

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]" [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

II

As Brazil points out, in *Bates* the Supreme Court rejected the central thesis of the federal cases the court in *Etcheverry* had relied upon. In *Bates* a group of peanut farmers

sued the manufacturer of an herbicide after it severely damaged their crops. The herbicide's label stated that in part that it was "recommended in all areas where peanuts are grown." The farmers sued the manufacturer on a number of theories, including strict liability, negligence, fraud, breach of warranty and violation of a state deceptive practices act. Lower federal courts found FIFRA preempted the farmers' claims because they found that a judgment in the farmers' favor would induce the manufacturer to alter its label. The Supreme Court reversed.

In interpreting the preemption provision of FIFRA, title 7, United States Code section 136v(b), the court in *Bates* stated: "[A] cause of action on an express warranty asks only that a manufacturer make good on the contractual commitment that it voluntarily undertook by placing that warranty on its product. Because this common-law rule does not require the manufacturer to make an express warranty, or in the event that the manufacturer elects to do so, to say anything in particular in that warranty, the rule does not impose a requirement 'for labeling or packaging.' [Citation.]

"In arriving at a different conclusion, the court below reasoned that a finding of liability on these claims would 'induce [the defendant] to alter [its] label.' [Citation.] This effects-based test finds no support in the text of [section] 136v(b), which speaks only of 'requirements.' A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement. The proper inquiry calls for an examination of the elements of the common-law duty at issue [citation], it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question, in any event, that will depend on a

variety of cost/benefit calculations best left to the manufacturer's accountants)." (*Bates, supra*, __U.S. at p. __ [125 S. Ct. at p. 1798-1799, fns. omitted].)

In light of *Bates*, Brazil's allegation that Sara Lee breached an express warranty, even if that warranty appeared on a federally approved label and even if liability for the breach would cause Sara Lee to change its label, was not preempted by FIFRA. As the court in *Bates* explained, liability for breach of a state statutory or common law duty does not require any alteration of a label and hence is not subject to FIFRA preemption.

We note that in addition to breach of warranty theories, in *Bates* the farmers alleged fraud and negligent-failure-to-warn claims which were premised on state deceptive labeling standards. The court found these claims were subject to preemption under FIFRA, but only if the state labeling standards were "in addition to or different from" FIFRA's own misbranding provisions. (*Bates, supra*, __U.S. at p. __ [125 S.Ct. at p. 1800].) The court remanded that issue to the Court of Appeal for a determination as to whether the state standards materially deviated from the requirements of FIFRA. (*Id.* at p. __ [125 S. Ct. at p. 1803.] Contrary to Sara Lee's argument, we do not find any claims in Brazil's third amended complaint which are premised on any state deceptive labeling standards. If on remand it develops that the plaintiff is asserting claims based on a state labeling standard, the trial court must, as *Bates* suggested, determine whether those standards are in addition to or different from FIFRA's own misbranding provisions.

In sum, in light of *Bates*, the allegations of the third amended complaint were not preempted.

III

As we noted at the outset, Brazil has never purchased any Ty-D-Bol cleaners, but instead alleged that she was bringing this action on behalf of the public. While such representative lawsuits were permissible under Business and Professions Code section 7204 before adoption of Proposition 64, Proposition 64 amended section 17204 and now actions under the UCL may be prosecuted only if the plaintiff "has suffered injury in fact and has lost money or property as a result of such unfair competition." (§ 17204.) Importantly, this limitation on standing applies to all cases, including Brazil's, which were pending at the time Proposition 64 became effective. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1261-1262 (*Huntingdon Life Sciences*).)

As we stated in *Huntingdon Life Sciences*: " ' "A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." ' [Citation.] A statute has retrospective effect when it substantially changes the legal consequences of past events. [Citation.] 'It is well settled that a new statute is presumed to operate prospectively absent an express declaration of retrospectivity or a clear indication that the electorate, or the Legislature, intended otherwise.' [Citation.]

" 'The repeal of a statutory right or remedy, however, presents entirely distinct issues from that of the prospective or retroactive application of a statute. A well-established line of authority holds: " ' "The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If

final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered." ' [Citations.]" [Citations.]" [Citation.]

" 'The justification for this rule is that all statutory remedies are pursued with full realization that the [L]egislature may abolish the right to recover at any time.' [Citations.] 'Because it is a creature of statute, the right of action exists only so far and in favor of such person as the legislative [or initiative] power may declare.' [Citation.] Unlike a common law right, a ' "statutory remedy does not vest *until final judgment*." ' [Citation.]" (*Huntingdon Life Sciences, supra*, 129 Cal.App.4th at pp. 1261-1262.)

Given these principles, Proposition 64 applies to this case and others pending on November 3, 2004, the day the proposition became effective. (*Huntingdon Life Sciences, supra*, 129 Cal.App.4th at pp. 1261-1262.)

IV

Brazil asks that if we apply Proposition 64 to her case, we remand the case to the trial court so that she may attempt to amend her complaint to substitute in her place a plaintiff who meets the current standing requirements of the UCL. We think this request has merit.

Code of Civil Procedure section 473, subdivision (a) has been construed to permit amendment to substitute a plaintiff with standing for one who is not a real party in interest. (See, e.g. *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 19-22.) " 'It is axiomatic that a motion for relief under section 473 is addressed to the sound discretion

of the trial court. More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court.' " (*Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 506-507.)

Because we have determined that the complaint is not preempted and because the substitution issue should be determined by the trial court, like the court in *Schwartz*, we will remand this case for a determination by the trial court as to whether an amendment substituting a new plaintiff in place of Brazil is appropriate.

DISPOSITION

The judgment is reversed and remanded to the trial court with directions to exercise its discretion and determine whether leave to amend to substitute a new plaintiff should be granted. If leave to amend is granted, the trial court is directed to conduct further proceedings consistent with the views we have expressed with respect to FIFRA preemption; if leave to amend is not granted, the trial court is directed to enter a judgment on the pleadings in favor of Sara Lee.

Brazil to recover her costs of appeal.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

McINTYRE, J.